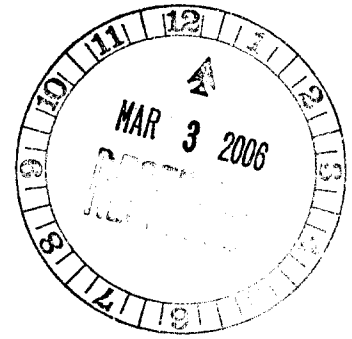


45909

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Of Counsel
W. Patrick Quast
P.O. 444
20 Harrison St.
Waldwick, NJ 07483
201-444-5990
Fax 201-444-5094

March 2, 2006

The Honorable Vernon A. Williams
Secretary, Surface Transportation Board
Mercury Building, Room 700
1925 K Street, N.W.
Washington, D.C. 20423

Re: Tri-State Brick and Stone of New York Inc. et al. Petition for a
Declaratory Order, FD 34824_0

Honorable Sir:

Enclosed please find the original and ten copies of a request for leave to file a reply in this matter, the certificate of service and a disk containing the material in electronic form.

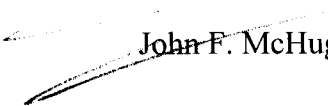
This request is required due to new actions taken by the respondent, City of New York, which appear to be designed to physically obstruct access to common carrier rail services by the public at the 65th Street Yard in the Borough of Brooklyn. These actions, the dumping of waste in a line nearly the length of this property, is more fully described in the declaration of Louie J. Formica, with photographs. This activity was not apparent when the petition was filed in this matter. The respondent's activity is ongoing.

While the respondent's actions do not yet affect petitioner's access to the rail services of the New York and Atlantic Railroad, the declaration of Mr., Formica and the application are submitted as the wall of waste now being built across this facility is further evidence the intention of the City to end rail service to the public at this location and devote these lands to more financially rewarding uses, notwithstanding the assertions made by the respondent to the contrary in this proceeding.

Therefore Petitioners respectfully request that this application be accepted for filing and for consideration.

Thank you for your attention to this matter.

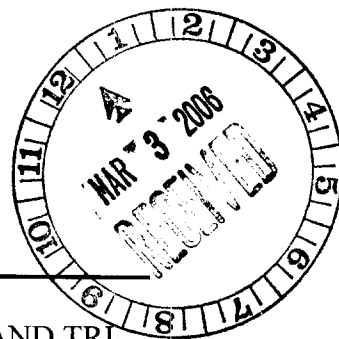
Very truly yours,


John F. McHugh

cc: Alex Menendez, Esq.
McLeod, Watson & Miller
One Massachusetts Avenue, NW
Washington D.C. 20001-1401

SURFACE TRANSPORTATION BOARD

FINANCE DOCKET 34824



PETITION OF TRI-STATE BRICK AND STONE OF NEW YORK, INC. AND TRI-STATE TRANSPORTATION INC. FOR A DECLARATORY ORDER

REQUEST FOR LEAVE TO FILE A REPLY

Petitioner requests leave to file a reply due to new facts which have come to petitioner's attention since filing the petition, to wit the creation by the respondent of wall of waste across the 65th Street Yard facility in issue here which bars public access to a substantial portion of the Yard.

In their petition the petitioners seek a determination that they are entitled to access rail services rendered by the New York and Atlantic Railroad via the 65th Street Yard, in Brooklyn, N.Y. The City of New York, acting through its agent, the owner of the yard, entered into an Operating Agreement with the Canadian Pacific Railroad, acting through its subsidiary, requiring that railroad to extend its rail services to Brooklyn to provide common carrier rail service to the public utilizing the Yard for that purpose. The City seeks to terminate that use now that the Canadian Pacific Railroad has been released from its obligations by the City. However, the New York and Atlantic Railroad has continued the service and intends to continue to do so. The initial term of the Operating Agreement has expired. Petitioner's contractual right to use the Yard to transload brick and stone products for itself and for other area customers was coextensive with the Operating Agreement. But the Operating Agreement and the petitioners agreements both contained clauses requiring the parties to extend the agreements on terms arrived at in good faith.

Petitioners assert that the City's refusal to negotiate in good faith is due to a desire to rid the yard of rail uses and devote it to more immediate and narrowly defined financially rewarding pursuits. Petitioner also asserts that common carrier rail services can not be terminated by contract.

Respondent, City of New York, in its reply insists that it is not seeking to abandon or to obstruct rail services rendered to the public at the 65th Street Yard in Brooklyn, New York, but that it merely seeks to evict the only rail consignee using such rail service. However, since this petition was filed, a wall of waste has been erected in the 65th Street Yard running from near the bulk head at the yard's west end nearly to the access road at the Yard's eastern end. This wall of waste, which is growing daily, now completely bars access to all rail facilities remaining on the yard other than that currently used by the petitioners and the northern side of the adjacent unused TOFC area. It completely bars access to the southern half of the yard and shortly will effectively prevent any expansion of rail service to customers at the Yard. Indeed the waste is piled on an area which includes an intermodal TOFC/COFC platform with two tracks which were to provide containerized intermodal services to the public, (See Exhibit D to the Petition, page 2 which includes a diagram of the yard showing the TOFC/COFC designated area). This facility could be used as a team track for general service to the community but for the City policies placed before the Board in this matter.

Louis Formica, in his attached declaration, provides photographs, received by him by e-mail on February 23, 2006, of this pile of waste, which is apparently demolition debris from highway projects. He asserts that this material is being delivered daily and that the wall is growing. This event clearly belies the City's position, stated in its reply,

that it is not seeking to force the abandonment of this yard. The City's actions clearly demonstrate that it seeks to render the 65th Street Yard unusable as a rail terminal.

The City's activity here, including the attempt to evict the petitioner and its current efforts to destroy the facility are efforts to disrupt rail transportation services as that term is well understood. The Supreme Court held in Erie R. Co. v. Shuart, 250 U.S. 465, (1919) that transportation by rail carrier as defined in the Interstate Commerce Act as amended by Congress in 1908 and again in 1913 (the definition incorporated into the ICCTA) included the loading and unloading of the rail car, whether that function was performed by the rail carrier or delegated by agreement to the cargo owner. In that case horses injured during unloading of a rail car were deemed to be the railroad's responsibility as the transportation contract was not complete until delivery was complete even where the consignee had contracted to unload the car. In Green Mountain Railway v. Vermont, 404 F. 3d 638, 644 (2d Cir. 2005) (miss cited as to page number in the Petition) the Court held that the unloading of goods by the railroad and the holding of goods for eventual delivery by truck was easily within the definition of rail transportation. Under the mandate of Erie Railroad v. Shuart (supra) rail transportation is rail transportation whether performed by the rail carrier or the consignee and under the rulings cited in the petition that definition includes the necessary services rendered by a non-rail carrier. This is a well accepted concept as the Court has fully explained:

...the transportation of livestock by rail was held to begin with its delivery to the carrier for loading onto its cars, and to end only after unloading for delivery or tender to the consignee at the place of destination. Covington Stock-Yards Co. v. Keith, 139 U.S. 128, 136, 11 S.Ct. 461, 463, 35 L.Ed. 73. The same rule has been repeatedly applied since the statute was adopted. Erie R. Co. v. Shuart, 250 U.S. 465, 468, 39 S.Ct. 519, 520, 63 L.Ed. 1088; Atchison, Topeka & Santa Fe Ry. Co. v. United States, 295 U.S. 193, 198, 55 S.Ct. 748, 751, 79 L.Ed. 1382 and cases cited; Denver Stock Yards Company v. United States, 304 U.S. 470, 58 S.Ct. 990,

82 L.Ed. 1469; 2 Hutchison Carriers, 3d ed. s 510. Appellant is thus engaged in the performance of a railroad transportation service and provides railroad 'terminal facilities' and services. It is a 'carrier' engaged in 'transportation of property wholly by railroad' as those terms are defined by the words of the statute.

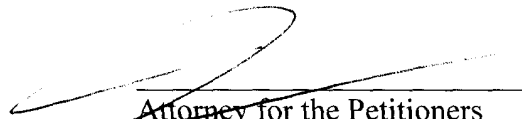
That appellant's stockyard is a terminal of the line-haul carriers, and that it performs their railroad terminal services within the meaning of the Act was recognized in Adams v. Mills, supra, 286 U.S. 409, 52 S.Ct. 592, 76 L.Ed. 1184,.

(explaining that even without the statutory changes then applicable to livestock transportation, services rendered in connection with transportation were rail transportation and within the jurisdiction of the ICC even when provided by a non-carrier). Union Stockyard and Transit Co. of Chicago Inc. v. United States, 308 U.S. 213,219 (1939).

The Petitioner's are interested persons and have the authority to institute this action, 49 U.S.C. §§11121 and 11704. The City, having devoted its lands to rail transportation purposes, is a rail carrier subject to the jurisdiction of the Board, The New York City Economic Development Corp.-Petition for a Declaratory Order, FD 34429 Decided July 15, 2004.

The new events at the 65th Street Yard are relevant to the issues raised in this Petition as they establish the City policy of baring access by the public to rail transportation services exists and is ongoing. Therefore, the petitioners should be granted leave to file this reply due to the changing facts and this reply should be accepted and considered by the Board.

Dated, New York, N.Y.
March 1, 2006


Attorney for the Petitioners
John F. McHugh
6 Water Street
New York, N.Y. 10004

212-483-0875

SURFACE TRANSPORTATION BOARD

FINANCE DOCKET 34824

PETITION OF TRI-STATE BRICK AND STONE OF NEW YORK, INC. AND TRI-STATE TRANSPORTATION INC. FOR A DECLARATORY ORDER

DECLARATION OF LOUIS J. FORMICA IN SUPPOR OF PETITIONERS REQUEST FOR LEAVE TO FILE A REPLY

I am an officer of Tri-State Bick and Stone of New York, Inc. and as such am familiar with this matter and if called to testify in this matter would testify competently as follows:

1. In Point II of its reply, Page 18 the respondent has stated that it is not and has no intention of obstructing railroad services provided by the New York and Atlantic Railroad at the 65th Street Yard in Brooklyn it merely seeks to bar access by all non rail carriers such as the petitioners. As is stated in the initial papers submitted in this matter, the entire 65th Street Yard property was developed by the City of New York for use as a public freight terminal and Petitioners here have taken advantage of that facility to gain access to the national rail network. This dispute arises as the City wishes to terminate our access to that service and evict the petitioners from the Yard. As stated in our petition, petitioners have no access to alternate rail facilities and the use of trucks as a substitute is financially prohibitive and rendered far more difficult by the lack of adequate trucking capacity nation wide, to say nothing of the well understood environmental effects of placing 300 car loads of heavy freight on the highways every year.

2. About the time our petition was filed the City apparently began using what looks like construction and demolition waste apparently from roadway projects, to cut the

65th Street Yard in half. This either had not started when this petition was filed or it had not progressed to the point that it was noticeable. However, as of today, there is a wall of waste running from east to west the length of the Yard. All access to the Yard is from the North, thus the pile of waste completely blocks access to the southern half of the yard and occupies the center of the yard, and, I am informed that City Department of Transportation trucks deliver more such material each day.

3. I attach seven photographs taken the week of February 20, 2006 which I received by e-mail from a friend on February 23. Photos 1, 4 and 7 are taken from mid yard looking westerly. The top of the two float bridge structures can be seen over the waste. Those bridges were built to restore cross harbor rail car float service via the Yard. They are unused even though I understand that two rail carriers, New York Cross Harbor and New York and Atlantic, have expressed interest in using them to interchange cross harbor shipments.

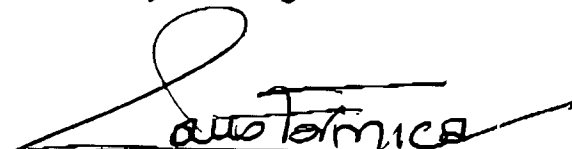
4. Exhibit D to the petition filed herein, second page, contains a diagram of the Yard. The area designated "TOFC/COFC Ramps" is the area now being used as a dump or as a wall and the area marked as 1665' is the section of the Yard used by New York and Atlantic. The arrow at the end of that yard is where the float bridges are located. The photographs attached were taken from about the spot on that diagram where the I in Intermodal is located. As can be seen by that diagram, there is no space on the south side of the currently used holding yard as that is against the Shore parkway and its exit ramps. As this waste pile now has reached the eastern end of the TOFC/COFC facility, nearly all access to rail service by the public other than that in issue in this petition and the north

side of the Intermodal area has been effectively blocked and with the growth of the pile I can assume that the entire intermodal area will soon be inaccessible.

5. The City's statement that it is not seeking to abandon the Yard may be technically true but it is clearly seeking to make sure that the Yard can not be used by any additional shippers other than those served by us. Therefore, the City's actions speak louder than its words and it clearly seeks to obstruct all rail access using City lands in Brooklyn notwithstanding its stated plans to expand rail facilities.

6. Petitioner is a rail dependant customer served by the New York and Atlantic Railroad at 65th Street. Petitioner is seeking a Declaratory Order that the landowner, City of New York, can not obstruct or terminate that rail service either by evicting the petitioners or by assessing land use fees which are unreasonable or now by constructing a physical obstacle to access.

I declare under penalty of perjury at New York, N.Y. on this first day of March, 2006, that the forgoing is correct to the best of my knowledge or belief.


Louis J. Formica

Subj: **FW: 65th Street Pictures**
Date: 2/27/2006 12:53:09 PM Eastern Standard Time
From: LFormica@tristatebrick.com
To: JFMcHughPC@aol.com
CC: Jenniferbeth1124@aol.com

From: Huttondbbs@aol.com [mailto:Huttondbbs@aol.com]
Sent: Thursday, February 23, 2006 3:31 PM
To: lformica@tristatebrick.com
Subject: 65th Street Pictures

I was driving through 65th Street last week. Look at the following pictures - I don't have any idea what the city of NY is doing with the 65th Property - but these photos show it looks like a dump. You can see the lift wheel from the lift bridges at the water's edge in the picture





2



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Donald B Hutton
716-553-5674

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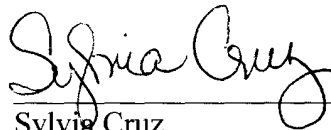
DECLARATION OF SERVICE

Sylvia Cruz declares that on this second day of March, 2006 that she served a true copy of this request to file a reply upon:

Alex Menendez, Esq.
McLeod, Watson & Miller
One Massachusetts Avenue, NW
Washington D.C. 20001-1401

by Federal Express.

Dated, New York, N.Y.
March 2, 2006

A handwritten signature in cursive script, reading "Sylvia Cruz", written over a horizontal line.

Sylvia Cruz
Office Manager
John F. McHugh, Esq.